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APPENDIX

DISTRICT COURT
COUNTY OF BOULDER
STATE OF COLORADO

Action No. 92CR601

REPORTER'S TRANSCRIPT

November 30, 1992

The People of the State of Colorado,

People,

vs.

L. D. LaFrankie,

Defendant.

The Motion's Hearing in this matter commenced on November 30, 1992, before the HONORABLE JOSEPH J. BELLIPANNI, Judge of the District Court in and for the County of Boulder, State of Colorado.

For the People: Mr. Steve Louth

For the Defendant: Mr. John Lucas

THE COURT: 92CR601, People vs. Leslie LaFrankie.

MR. LOUTH: Steve Louth on behalf of the people. Mr. Lucas represents Mr. LaFrankie who is here and Mr. Lucas is out in the hallway.

MR. LUCAS: John Lucas for Mr. LaFrankie.

THE COURT: I don't have any motions for which there would be a hearing. What motions are we going to hear? Are there statements?

MR. LOUTH: Yes, there are statements.

THE COURT: Are you ready to proceed?

MR. LOUTH: Yes, I would call Officer Scott.

Having been called as a witness and after being duly sworn, the witness testified as follows:

THE COURT: Please be seated, state your name and spell your last name.

A My name is Joe Brian Scott, Police Officer for the City of Longmont.

BY MR. LOUTH: DIRECT EXAMINATION,

Q Officer Scott, what are your duties for the police department in Longmont?

A I am the lead detective in the forgery and fraud department in the investigations section.

Q On April 10, 1992, did you investigate a theft that occurred at Hi-Tech Manufacturing Company in Longmont, Boulder County, Colorado?

A I did.

Q And what was stolen from that business?

A A computer, a number of peripherals related to that computer and some computer memory chips.

Q And approximately when did that theft occur?

A In late March and early April of this year.

Q What did you do on the 10th of April of this year as far as investigating the theft?

A I spoke to some of management personnel at the facility and then interviewed the suspect, Mr. LaFrankie, seated at defense table in the purple coat.

Q Okay and what did the management tell you?

A They told me that they had a number of items disappear, most significant was initially the computer and related peripherals as well as a number of computer chips, memory chips. They suspected Mr. LaFrankie because he had access and because he had approached personnel advising whether they might know where the computer might be.

Q Did you determine Mr. LaFrankie was an employee of that company?

A Yes, he was an employee.

Q Okay, when you arrived at the business on the 10th of April, where was Mr. LaFrankie?

A He was on the ground floor on the west end of the building doing whatever it was he did.

Q Okay and did management take you to him or did they go get him?

A Well, we went down to that location and I waited a little bit down the hallway or in a room while management personnel contacted him and escorted him upstairs.

Q Okay and were you already upstairs?

A No, we followed them upstairs.

Q And who is "we"?

A I went to the location with Detective Goecke, also a Longmont Police Officer.

Q And when you followed them upstairs, where did they go to?

A To the main administrative area of the business which is on the top floor.

Q Okay, are we talking about a very big business, could you describe that for the Court?

A I think it has something around 100 employees, it's not that large of a building.

Q Okay and did you meet with Mr. LaFrankie?

A Yes, I did.

Q Describe how you made contact with him?

A We got up to the office of that location. I identified myself and Detective Goecke and I asked Mr. LaFrankie if he had a few minutes to talk to us and he said he would be willing to talk to us, he wanted to get the matter

straightened out.

Q Obviously when the manager made contact, he said something, are you aware of that conversation?

A No.

Q Okay and describe the room where you met Mr. LaFrankie at?

A The room in which the interview was conducted was the president's office, a very large office, well lit with one desk and several chairs in it.

Q Okay and after Mr. LaFrankie indicated that he did have a few minutes to talk to you, did the manager stay in the room?

A Well, they we asked for a place to speak and we then went into that office and they left.

Q Okay, so who was left in the office?

A Myself, Detective Goecke and Mr. LaFrankie.

Q Okay. Did you have any indication as to how long Mr. LaFrankie had been working at that business?

A My impression was it was up to several months but that is all.

Q Okay and how was Mr. LaFrankie dressed?

A Similar to what he is wearing now, that sort of clothes.

Q Okay and how are you and Detective Goecke dressed?

A The way I am right now.

Q You did, of course, identify yourselves as police to him?

A Yes.

Q Was that prior to asking him if he had a few minutes to talk with you?

A Yes.

Q What was the defendant's mood like when you first made contact with him?

A He was fine, he was perhaps a little apprehensive, that's all.

Q When you asked him if he had a few minutes to talk with you, did you tell him that he didn't have to talk to you?

A I don't know if I said that but I phrased it as a very open question, "do you have a few minutes to talk to me?"

Q Okay and did you sit down for the interview?

A Yes.

Q Was everyone in the room seated?

A Yes.

Q How far away was everybody, approximately?

A Oh, from myself to the stenographer's position, I guess that is five or six feet.

Q Was there anything between you and the suspect?

A I don't believe so.

Q And explain to the Court how you began the interview?

A Well, the first thing I did was I had a tape recorder in my pocket. I turned it on and then I identified myself again to him and I identified Detective Goecke and I explained why we were there again.

Q Okay, did you tell the defendant that you had a tape recorder in your pocket and you were recording the entire--

A No.

Q And after you had the tape recorder turned on--well, let me back up, did you tape the interview?

A Yes.

Q And do you have that tape here today?

A Yes.

Q After the tape is turned on, how did you begin the interview?

A I said my name is Lee Scott, this is Detective Goecke. I explained to him essentially why we were there, we thought he had information that we would be interested in in regard to a theft that had taken place at the business.

Q Did you ever give the defendant Miranda Warnings?

A No, I did not.

Q Okay, how did he respond after you identified or introduced him to Detective Goecke and yourself again?

A He was pleasant.

Q How did he respond after you said that you thought that he might have some information that you were interested

in?

A He indicated that he had purchased a computer at a garage sale and I explained to him what I felt were some inconsistencies in his statement to management because he had originally told management he had bought this computer or that he was aware of this computer and I explained to him the inconsistencies that I saw in that possible statement and we discussed it for several minutes.

Q So, he mentioned at the outset of the interview you were investigating a theft of a computer?

A Yes.

Q Did he get that information from you?

A Well, we told him about it but he knew what we were talking about, he knew it was about a computer that was at his house.

Q Okay and specifically what was his explanation as for as having the computer?

A He told me that initially that he had purchased the computer for $200.00 at a garage sale, I believe he said three weeks before and that he just thought it might be conceivably the one that was stolen from the business.

Q And did he indicate why he thought it might be conceivably the one from the business?

A He just thought it might be.

Q Okay and how did you respond to that?

A We discussed it at some length, including the probabality of him being, of 100 employees at the business, going to one of the enumerable garage sales in Longmont and finding exactly the computer that was stolen from the company on that day and I expressed the opinion that I didn't feel that was a very likely proposition. I told him I thought he probably would win the lottery first. We discussed that back and forth. As I said, he was apprehensive and he got a little more apprehensive as we talked. He was concerned about what might happen and I told him it wasn't up to me what happened. I explained that I thought perhaps a mistake might have been made here, mistakes can do. I admit I had made mistakes in the past as had Detective Goode and that one thing to do was to rectify a mistake rather than compound it by lying if there was an issue to that effect.

Q Did you ever make any promises to him as to what would happen if he did confess to stealing the computer?

A I told him that what eventually happened was not up to me, it was up to the Judge at some point in time. I did tell him that with one exception, regardless of what he told me, he would not go to jail that day. I said that if he did confess to murdering Mother Theresa, he would probably go to jail for that but other than that, I didn't see him going to jail that day.

Q At what point of the interview process did that

conversation come out as far as indicating to him that he was not going to be jailed that day unless he confessed to basically murdering someone?

A Oh, the middle to the late half of the interview, after he expressed some concern about what might happen to him in regard to this matter.

Q Did that conversation come out prior to his confession?

A Yes.

Q Okay, and the defendant eventually confess to stealing the computer?

A Yes.

Q And do you recall at what point of the interview he confessed?

A I believe it was virtually at the end of it.

Q So after all of the interview?

A Just before he left to go to his house.

Q Okay, now, how long did the interview last then?

A Thirty minutes.

Q And how would you describe the defendant's mood during and throughout the interview?

A He was calm but he was clearly nervous and apprehensive. His mannerisms were such that you would expect from someone who might not be telling you the truth. He had difficulty looking us in the eye, was figiting and moving

around. He kept asking around questions.

Q Around questions, could you explain what you mean by that?

A Well, instead of answering the question directly, he would sort of be asking something off on a tangent.

Q Is that how you got on the conversation of whether he was going to jail or what would happen if he confessed? Was it in response to a question?

A It was in response to a question he asked.

Q Okay, emotionally, how was he throughout the interview?

A He was quiet, quiet, he seemed very thoughtful about his answers and the questions we made to him. It was a very slow, low-key exchange of opinions for a significant part of the interview. I told him a number of times I didn't think he was telling me the truth and I thought he had knowledge of this theft and told him that it's possible he might not have done it but in my estimation, he at least knew who did.

Q And how did he respond to that?

A He said he didn't take it.

Q What eventually brought out his confession?

A I am not sure.

Q Okay, well, did he ask you many questions?

A Oh, a number of them. I couldn't tell you how many. It was a give and take conversation, our expressing our

opinion, explaining to him we thought eventually we would find out anyhow and I know I told him a number of times I could understand if someone made a mistake, pressures can be significant on someone and cause them to make bad decisions and that the important thing was to rectify that if that was the case.

Q Mr. [redacted], did you ever indicate to him what evidence you had or give him a synopsis of the evidence you had prior to [redacted]?

A [redacted], we discussed the fact that he had come to the company and we wanted more in the company-- before anyone inside the company knew about the theft in the first place.

Q [redacted] how he came to be up to the company?

A [redacted] had requested management personnel to tell them where he might know where the computer was at before anybody else, the police, the media, vice-president, I guess, knew about it and came to us and we had knowledge in the company that was going on and [redacted] already come to the company and discussed [redacted] he might know where it is.

Q Okay.

A We also discussed the fact he had access to the location of where the computer was taken.

Q So, you didn't make any mischaracterizations of evidence as far as indicating to him that you knew he had taken it?

A I stated several times in my opinion I believed he had been involved in the theft. I don't believe I ever told him we had proof beyond a doubt he did it.

Q Did you ever indicate what that opinion was based on?

A It was based on what I felt were the inconsistencies of his statement, the information with regard to him contacting the company about the computer. During the interview, we discussed his finances. He didn't make a lot of money there. He allowed me to look at his checkbook. At the time he purchased the computer, he had $1.00 in the bank and I asked him why he spent $200.00 on a computer when he doesn't have any money in the bank for food and he told me well, I got food stamps and we talked about that back and forth and I expressed my opinion I didn't think someone would buy that computer when someone had that much difficulty putting food on the table for their children.

Q And is that why you asked him if you could look at his checkbook?

A Yes.

Q How did you ask him that question?

A "Would you mind if I look at your checkbook" and he said, "no" and he showed me his checkbook. I then looked through his register, the running balance he was maintaining in the account, the checks he was writing and I think the highest

balance I saw on there was about $300.00 between April 1 and the date of the interview.

Q Okay, did the defendant ever ask you to terminate the interview?

A No, he did not.

Q Did he ever ask to leave?

A No, he did not.

Q Approximately, for the record, what age is the defendant?

A I would say he is approximately in his mid 20's.

Q Okay, and are you familiar with his educational background?

A I couldn't speak to a specific educational background. He was working for a high-tech firm and he does know how to use computers, that was, in fact, stolen in this case. He was in fact, altering the computer's components, upgrading it as he explained to me later from what it was when he took it. It's not an occupation, if you will, for somebody who is totally uneducated.

Q Were you and Detective Goecke armed that day?

A Well, I was, I assumed Pat was, I don't know.

Q Did you ever show or did you wear your gun on the outside of your plain clothes?

A No, it's inside my coat.

Q Okay and to your knowledge, did you ever expose

that?

A Not intentionally, no.

Q Did Detective Goecke?

A I never saw her gun there.

Q Okay, now, you know Mr. DaFrankie from a couple years earlier; don't you?

A Yes.

Q Okay, how do you know him?

A The last time I arrested him for fraud by check.

Q And how was that case disposed of?

A I believe we got some sort of deferral or probation.

Q Okay, do you know what year that was in?

A The case had a 97 case number. I am assuming that is when it happened.

Q Were you the arresting officer in that case?

A Yes.

Q Do you have any recollection of the case specifically?

A I interviewed him at that time about his case as well. I don't remember a lot about it but I do remember I did interview him.

Q Other than the fraud by check probation, do you have any other knowledge of his criminal background?

A I did check the Colorado Crime Information Center and found that he had previously been arrested and convicted

for perjury in Adams County.

Q Do you recall what year that was?

A I think it was 1990.

Q Okay, at the end of the interview which you said lasted approximately 90 minutes, what was the defendant's mood like at that point?

A I think he was relieved. The impression during the entire time I was interacting with him was he really wanted to tell me about it but he was very concerned about what might happen to him.

Q Okay and he was then free to go. Do you know if the defendant was on the clock or off the clock as far as getting paid?

A Well, I don't know when he went out. I don't know whether he was or not.

Q What time?

A 3:30 or 4:00 in the afternoon, I believe.

Q Do you know what time he normally got off work?

A No.

Q After he confessed, what did you say to him?

A We had previously discussed searching his house for the computer and we confirmed he was still willing to allow us to do that and then we left the business. He drove and we followed him to his house.

Q He drove in his car and you drove in your car?

A Yes.

Q You met him at his house?

A Yes.

Q And did he-- well, what happened there?

A He took us to the kitchen-- first of all, he signed a consent to search and he took us to the kitchen and there was the computer and most of the other parts to the computer and he also had some other company property there of-- some sort of test board or something and we did not find any of the computer memory modules at all.

Q Did he ever admit to taking anything other than the computer?

A No, not as far as what all he took was the computer.

Q Did he describe how he had taken that computer?

A He picked it up and walked out the door with it.

Q That is how he stated--

A Yes, sir.

Q After you got the computer at his house, what happened?

A We gave him a receipt for the items we took. I think we got a printer monitor and some other stuff and made arrangements for him to meet us later at the police department which he did.

Q Later that same day?

A Yes.

MR. LOUTH: Your Honor, no further questions.

THE COURT: Mr. Lucas?

BY MR. LUCAS: CROSS-EXAMINATION,

Q Detective Scott, do you have a copy of the transcript of that interview?

A With me, no.

Q With you right now, do you?

A No.

Q Okay, if I can approach. I will mark this as Defendant's Exhibit 1 for the purposes of this hearing. May I approach? Do you recognize this as a transcript of the-- a 17 page transcript of the interview that you did with Mr. LaFrankie?

A Yes.

Q Okay and we will say you had the tape here; is that correct?

A Yes, sir.

Q Okay, now when you went down the production floor, how many of you went down there to approach Mr. LaFrankie? You said management, how many people were there?

A I think just one guy.

Q You and Detective Goecke and one guy were following along?

A We went down and-- he showed us where we were and we

went down further into the room, oh, maybe as far as from here to the back of the room and stood there while he went in and talked to him.

Q So, he goes and talks to him and you are standing away and then he brings Mr. LaFrankie over to your office?

A No, he took him up the stairs and we followed him.

Q So, you are at some distance away, about the distance of the Courtroom away and then they walk over to you and then you walk further up the steps and down to the office; is that correct?

A No, they walked-- we were down there. They walked this way away from us and we followed them.

Q Then you followed and did you get real close to them when you were following them?

A I'd say close to reasonably close, I am not sure.

Q The last the person that went and got Mr. LaFrankie, was he the guy who owned the place?

A I think that is who it was, I am not sure. It wasn't the person that filed the initial complaint.

Q Pardon?

A It wasn't the person that filed the initial complaint.

Q He took you up to his office, to use his office?

A First, we went over to the administrative office area and outside the offices, we identified ourselves to Mr.

LaFrankie and told him why we were there.

Q And you said what to him at that point?

A I asked him if he had a few minutes to talk to us and I told him who we were.

Q And he said, yes that is okay, he would talk to you?

A Yes.

Q And that is all the conversation that took place?

A That is essentially-- we told him what our names were and about this computer and then there was a little discussion between myself and the company representative as to where we could conduct an interview because we wanted some place relatively quiet and we ended up being in the owner's office.

Q Okay and then Mr.-- did Mr. LaFrankie tell you when you were interviewing him he was concerned over losing his job over this?

A I believe he mentioned that, yes.

Q He did?

A Yes.

Q Okay and did you identify yourself only after you got into the office or did you identify yourself in the outer area first and then you went--

A I believe we identified ourselves in the outer office and then identified ourselves again on the tape recorder in the office.

Q Once you got into that office was there any other conversation done that doesn't appear on the transcript?

A I don't believe so.

Q Okay and the boss whose office this is is the alleged victim in this case; is that correct?

A Yes.

Q And can you again-- you said something about it being large or what, can you tell us how big that room is?

A Oh, about -- I'm not -- this much of this front area, I suppose. It was around 15 feet by 15 feet, there are windows on two walls.

Q Okay, one of the windows overlooks--

A One looks out west toward the mountains and the other looks south.

Q There will be six in this area-- where did Mr. LaFrankie -- sit in this 15 or 16 area?

A Well, I'll -- I'll move these chairs over about here.

Q Over by-- if we are using-- there is a model over by the witness stand.

A In this area, one chair was facing toward this room. that would be the north and then there were two chairs facing each other, one facing north and one facing south.

Q Okay and that is where you and the detective sat were in those two chairs, you and the other detective?

A Mr. LaFrankie sat in the north chair facing south.

Pat, I believe, sat in the chair facing in this room which would be north and I sat in the one facing north. Did I get that right? He was across from me and next to Pat.

Q So, you were sitting about six feet away from him; is that what you testified?

A Four to six feet, I guess.

Q Four to six feet and how about Pat, how close was Pat?

A She was sitting next to me and next to him so she was probably a couple feet away from him?

Q Okay, did the [illegible] come into the room at all, anyone else besides the [illegible] and you came in?

A Yes, after the interview, Mr. LaFrankie wanted to make a [illegible] to the [illegible].

Q Okay so [illegible], anytime during the interview did anyone [illegible] out?

A I don't recall anyone coming in, nobody came in and stayed.

Q Was the door closed?

A I believe so.

Q How did people move throughout the interview? Did this interview take a long time? Did anyone move, you know, out of their chairs?

A Mr. LaFrankie fidgited quite a bit.

Q But he didn't get up out of his chair?

A No.

Q Now about you or Detective Goecke? Is it Goecke or Goeke?

A Goecke.

Q Did either of you get out of your chairs?

A No.

Q Did either one of you lean toward him to try to drive a point home? Were you leaning or gesturing towards him?

A I am not -- I did. I would lean forward.

Q Do you recall you leaning in to him because you had kind of a heated exchange with him sometimes; didn't you?

A Well--

Q You called him a liar several times; didn't you?

A I suggested that he wasn't telling the truth.

Q You told him several times, "I know you are lying, I know you are lying," didn't you?

A I believe I said I believe you are lying.

Q How long did this thing last, about 30 minutes?

A Yes.

Q Did you ever tell him that he is free to leave or not in custody?

A No, I didn't.

Q Now, we went through this before, he initially denies taking the computer right off the bat; right?

A Yes.

Q And he continues to deny that throughout the interview until the 17 pages-- I guess it's about page 14 or 15 that he finally-- I think it's page 15 where he finally says something about that?

A I am not sure which page it is but that could be approximately right.

Q Okay and then you asked him to search his house on page two here near the top and he tells you-- you say, "do you mind doing that" and he says "no"; is that right?

A Yes.

Q Now, this interview-- you could characterize this interview as confrontational from the start; is that right? This is highly confrontational with him right off the bat; isn't it?

A No.

Q But the first thing out of your mouth you are telling him that you think he stole the computer, right off the bat before he says anything on this tape; is that right?

A I don't think I accused him of stealing it.

Q Well, okay but first-- after the introduction, you say who you are and then you say that people-- you say, "you just here to rectify mistakes when you figure out that it's a mistake," right? You tell him that kind of right up front?

A Yes.

Q And then you say, "you already made statements to people indicating knowledge of the incident before anybody else

would have told me about it and nobody in the plant except the president and the general manager knew the computer was gone and you come up and tell them how to find a computer at a flea market," is that right?

A That is correct.

Q And you tell him a little later down in that first page, you say to him, "Based on information that I have, it really leads me to believe that you are involved in this."

Is that correct?

A That is correct.

Q And you told him that your major goal -- sort of at the beginning of the interview, you told him your major goal is to get the computer back; is that right?

A Yes, I did tell him that.

Q You don't tell him your major goal is to solve a crime or something, you tell him your major goal is just to get the computer back; right?

A It's all part and parcel of the same thing.

Q You noted -- you testified earlier how Mr. LaFrankie was calm and yet nervous. I want to ask you a couple of questions about that. Right off the bat on page two, you tell him he looks as nervous as a cat on a hot tin roof; right?

A That is about halfway down the second page.

Q And I know you don't want to call this confrontative, don't you say to him right on the second page,

"Listen to me, Ben, don't blow smoke at me, cause I'm going to find out, okay?"

A Yes.

Q Don't you say that to him?

A Yes.

Q And don't you say it in that kind of voice?

A What kind of voice?

Q Like confrontative, "Listen, Ben, don't blow smoke at me, cause I'm going to find out," right?

A I'm not. I don't feel it was confrontative.

Q And you felt that you are going to be able to identify [illegible] taken from the store, is that correct-- or from [illegible], correct?

A Yes.

Q And you're going to have some questioning about polygraph tests. So you're saying this would be-- I am referring to page three, the lower part of page three that Officer Goecke says something to the effect that she knows he would fail a polygraph, is that right? She says, "We are trained specifically to be able to tell and I can tell from here?"

A It does say that.

Q Okay and during this conversation, Detective Goecke says that, "I can tell if you have been lying and you look like a poster boy for lying," that kind of thing?

A I believe there is a word-- remarks to that effect.

Q Referring to page five of the transcript, you were talking earlier-- this relates to something you were talking about on direct, there is an exchange here where you start talking to him about what a Judge would do with a person who admits that they did something wrong versus a person who maintains that they didn't. Do you recall that?

A I believe I asked him to put himself in the position of the Judge, "What do you think a Judge is going to think when somebody comes in and admits they made a mistake versus somebody comes in and denies it when all the facts point to them?"

Q And you say something to him, "Do you think the Judge is going to hear you got it at a garage sale? He's going to say, Ben had access at work." Do you recall that exchange?

A Part of the tape is not understandable but there is a statement, "Do you think he's going to hear you got it at a garage sale" He's going to say, Ben had access at work" and the non understandable portion, "What do you think is going to happen to you? What makes sense to you?"

Q And there is something that is not understandable and Mr. LaFrankie responds and then Officer Goecke says, "Do you want a Judge" and something else that is not understandable and Mr. LaFrankie says, 'no, I don't." Is that right?

A Yes.

Q Now, do you recall what Officer Goecke says at that point?

A I think it was something along the lines of, "do you want a Judge to think you are a liar."

Q Okay and then can you read-- this would be the last question on this page, can you read the next statement you have there, the paragraph about what you are telling him about the stuff-- about what a Judge might do or not?

A "If you were the Judge and you had to"-- not understandable-- "and one of them says, I made a bad mistake. I did something I shouldn't have"-- not understandable-- "and I did it and I'm sorry or when you have somebody come in and say, I don't know where that computer came from. I don't know how it got there. I bought it from some guy and it turns out you"-- not understandable-- "You're the Judge. You tell me. How are you going to respond to that? You're the Judge who is going to-- I'm going to look at that if I'm the Judge and I'm going to say, I think he got the message. He maybe needs a break. He didn't get the message. What's he going to say about the guy who did get the message?"

Q Did he say something to the effect that the Judge could look at somebody who confesses and say, "I think he got the message and maybe needs a break" is that right?

A Yes.

Q Okay, now, let me go back to the polygraph for just a moment and ask about a couple other aspects. Later on in that same page you say to Mr. LaFrankie, "What happens when you get the polygraph done? What's it going to say?" Do you remember that?

A Yes.

Q And he says, "I don't know" and you say, "I do." Is that right?

A Yes.

Q And then there you talk about a polygraph later on page eight. I'll just refer you to that where you say-- the middle of page eight, "When we put you on a polygraph, by your own admission, you're going to fail it cause you're lying. I can tell you're lying. You're sweating like a stuffed pig right here, okay?" Is that what you said to him about the polygraph?

A I said to him about his appearance.

Q But you say, "When we put you on the polygraph, you're going to fail cause you're lying." Is that right?

A What I say is, "When we put you on a polygraph, by your own admission, you're going to fail it cause you're lying. I can tell you're lying. You're sweating like a stuffed pig right here, okay?"

Q Let me ask you about some other questions regarding what is going to happen to Mr. LaFrankie. Referring you to the

top of page seven, you indicate to him, "So, it's not as bad a mistake as it looks and you're not stealing"-- not understandable-- "Okay. So, we're just talking about a little mistake here." Is that correct?

A That is correct.

Q And then again later on you make some reference to how well he is going to be treated on page 10 when you asked him if he was on probation; do you remember that?

A "Are you on probation right now?" His answer, "not right now." "So you don't have to worry about that?" Then it's not understandable.

Q And then he says, "It's done. It's over with" and you say, "So you don't have anything to worry about?" His answer is, "No." Is that correct?

A Correct.

Q Did you ever tell Mr. Zaremski that-- you got this thing that keeps beeping up and you say, "When we put you on the polygraph." Do you ever tell him that you really can't make him take a polygraph? Do you ever say that?

A He said, "We want you to take one."

Q Well, you say, "When we put you on the polygraph." Did you ever tell him that you can't make him take a polygraph?

A I believe earlier I asked if he would be willing to and he agreed to do that.

Q Okay. It seems like the first part you are talking

about that is on page three where the first time a polygraph is mentioned is not you asking if he would take one but that is the part where you say, "What would happen if we put you on a polygraph right now" and officer Goecke essentially says, "I know he is going to fail. I can tell from here, we are trained specifically to tell." Is that right?

A You are right.

Q So, he doesn't really say, "I would be willing to take a polygraph?"

A Right.

Q Okay. Let me ask you about something about the tone of voice in one of the exchanges we have here. I refer you to page eight on this transcript, if I may. You are talking to him and you are telling him, "if you made a mistake, we need to get it out on the table now." He says, "That's what I'm trying to do. 'If it's a stolen computer, yes, I've made a mistake of purchasing a stolen'-- did you interrupt Mr. Gutfrankie there?

A Okay, you are talking about page eight?

Q Yes, about two thirds of the way down, he is saying, "If it's a stolen computer, yes, I've made a mistake in purchasing a stolen-- and do you recall interrupting him there?

A That is the way the text reads. I don't recall but that is the way the text reads.

Q Can you read the next four lines what the responses

are with you and Officer Goecke?

A He makes this statement and I then say, "Ben", there is a pause, Detective Goecke then says, "No, no, no, no, no." I say, "Ben"-- there is another pause. Goecke said, "Ben's not going to say."

Q "Ben's not going to say," it looks like?

A "Ben's not going to say," correct.

Q Now, when this is happening, there is some-- there is some increase in confrontation with Mr. LaFrankie. At this point, your tone of voice is becoming stronger with him; is that correct?

A [illegible]

Q You're not going to say, "Ben, no, no, no" and "Ben" and "Ben is not going to say" but through none of that you never changed your voice is just flat and normal and no worse or [illegible]

A It would be as normal and soft as ever.

Q And then you tell him that his story about buying this at a lottery-- or at a garage sale is so unlikely that he would have a better chance of winning the lottery; is that correct?

A That is right.

Q And you tell him that to your knowledge the chance of winning the lottery is one in 5.2 million and you tell him easily the odds of buying that stolen computer at a garage sale

are much worse than that; is that right?

A Yes.

Q This part where you start talking about being the Judge again or what a Judge would do again and I want to reference you to that, it's on page 13, kind of the middle of the page, the longer paragraph that you talk about-- can you find that on there?

A Yes.

Q Okay and don't have you got-- what do you say, beginning with the words "If you were the Judge" can you tell the Court what it is that you say, the rest of that paragraph and Mr. Lafyatis's response?

A I think it has to be taken in context and you have to understand the whole statement I said.

Q Read the whole statement, that is fine.

A I can understand that, Dan. I can understand being real nervous. I can't tell you what the Judge is going to do about this. And again, I go back to what I told you. If you were the Judge and you had somebody come in and say, I made a mistake, I'm sorry. Or you had someone come in and say, I don't know about that. All the evidence shows that, in fact, that's how it got there. What are you going to do if you are the Judge? What are you going to do? If you were the Judge, what would you do? Would you give a break to somebody who came in and lied in your face?"

Q Okay, were you talking about all the evidence shows that, in fact, that is how it got there? Did you explain to him anymore of what the evidence was that you had besides the inconsistencies in his statement?

A It's not in the transcript, sir.

Q Do you recall other things that you may have told him throughout this about what all the evidence was that was against him?

A The inconsistencies in his statement. The very, in my view, limited likelihood he would just happen to be at the right garage sale at the right time to buy the computer that was stolen from a place where he was working. All of those things led me to believe that he was involved in it.

Q Okay, approximately just a page or two, I want to ask you about some other things that were said. Mr. LaFrankie is talking-- you are saying about, "Why don't we go up to your house," this is at the bottom of page 10 and he says, 'If it's a good chance"-- don't understand-- "and if it is where do we go from there." Do you remember him asking you that?

A "Why don't we run up to your house." He says, "If it's a good chance"-- not understandable-- and if it is where do we go from there?" I said, "Well, we'll have to see."

Q There is a couple of other things that you and Detective Goecke said and then you make a comment, "That's why a polygraph works." Is that right?

A Pat told him, "There's certain things a person does without"-- and what she was referring to was autonomic nervous responses, "and there's certain things that your body does"-- she was referring to the fact you can't control things like your heart and blood pressure and I said, "That's why a polygraph works."

Q And then, "that is why a polygraph works." Then she says things about the panty boy stuff, about him being a panty boy or whatever, that is how bad you are at lying and is this the point where you say something about not taking him to jail? Can you tell the Court what it is you say next about specifically what you say about not taking him to jail?

A "I'm above your questions, to answer your question, unless you tell me you murdered Mother Theresa, you're not going to jail anyway, is that's what you're worried about, okay."

Q And then-- soon after he makes a comment, you did say something, "We don't put people in jail unless we have to." Right?

A That is correct.

Q And then later on in that same exchange you said, "Now, I can't tell you what they're going to do to the guy that stole this, okay, except to say, and you remember that Boulder County is the place they sent somebody to college for murdering somebody, okay. Okay." Is that what you said?

A Yes, it is.

Q And what is behind this here when you are down at the end of the sentence and you are saying, "sent somebody to college for murdering somebody, okay, okay?" What is behind this. Is there some nodding going on where you are trying to make some kind of connection like that you understand what I am telling you about?

A I don't recall nodding. I am not saying it didn't happen, I don't recall.

Q Are you trying to communicate to him or anything like that?

A I guess so to him.

Q Are you trying to communicate to him that this is something that you are not going to be treated very harshly; is that what you are trying to communicate?

A What I was trying to communicate is that he may have made a mistake, but it's not the end of the world, mistakes happen.

Q So, what you are trying to communicate in this exchange is that he is not going to be sentenced harshly?

A Yes, in my estimation.

Q And this is still back at a point before he confessed. This is the time where you are still questioning him about that; is that correct?

A Yes.

Q And then a little later on there is an exchange that

is unusual on page 13 or 14 where there is kind of a theological Christian discussion by you and Detective Goecke, do you recall that?

A Mr. Lafferdie brought it up first about the church that he belongs to.

Q Right, he said the last time he got in trouble they removed him from the church and even people from the church couldn't talk to him, even his own family?

A I forgot the term he actually used but it was sort of like shunning and the last time he got in trouble which was for the check case I already told you for the other time, nobody talked to him for a year.

Q And then he told you that he thinks that if they see that again-- he gets in trouble again, he will be released from the church, is that right?

A My understanding was by him saying the same thing would happen all over again.

Q And then I told him-- essentially you tell him-- you start talking to him about how God will know if he is lying and then he will have to face him a lot more seriously than he has to face you; is that right?

A That is correct.

Q And then this goes on-- there is more of this too, I mean you and Detective Goecke are doing some more talking about this, about the things that Christ had to face and he knew

before he was born he was going to have to be sacrificed and all this stuff goes on for a little while; is that correct?

A That is correct.

Q And then you make a statement on page 15 at the top where you say, "I understand how nervous you are. I'm doing everything I can to reassure you that this is not the end of the world." Is that right?

A That is correct.

Q And this is still before he admitted he took the computer?

A That is correct.

Q And just before that, you actually asked him to return the courtesy because the last time you had a case with him, you thought you treated him pretty well and you say, "I wish you'd give me some courtesy back," do you recall that, the bottom of page 14?

A I don't think at that time I knew he had been arrested by myself earlier.

Q The last couple of questions I have had to do this thing that also goes on on page 15 where you are talking about another person who is a known liar, that the police department and most police officers know he is a liar; do you recall that?

A Yes.

Q And do you recall at the end of that saying, "They

all knew he lied and they all laughed when he went to jail again. You know what? He went to jail. He's still there, okay." Do you remember that?

A That is correct.

Q And Detective Goecke says, "And that was before Court" and you say, "Yeah". Correct?

A Yes.

Q And then you say something about how you are going to make reference to the district attorney about whether you felt he had the Smith -- lied to you, something to that effect, that that would be the same regard to the district attorney; is that right?

A That is correct.

Q You give back that job thing here -- his job was through working as a temporary service; is that right?

A I believe he was working for a temporary service.

Q You know he made like $5.25 an hour?

A He said he was getting $300.00 a week with overtime and I don't know how much that works out to an hour.

Q And so then it's not until after that last comment we had, it was not until about page 16-- well, we went over this already. I ask our exhibit be admitted into evidence.

THE COURT: Any objection to exhibit 1?

MR. LOUTH: No objection.

THE COURT: It's admitted.

MR. LUCAS: I also ask that we do, Judge, a motion and order to get a free copy of the tape recording and I don't know that the Court ever ruled on that.

THE COURT: You did not get it?

MR. LUCAS: I didn't get it and I didn't get it back. We waited and I was gone a portion of last week and my investigator told me we hadn't gotten the motion.

THE COURT: You do that?

MR. [illegible]

THE COURT: [illegible] need to make a copy and do that.

MR. LUCAS: I ask that tape be entered into evidence at this time and we will make a copy from it.

THE COURT: You can review it, okay? What else? Redirect?

BY MR. [illegible]: REDIRECT EXAMINATION.

Q You. Well -- Trooper, in regard to the issue of the polygraph which comes up for the first time, I believe, on page-- well, explain to the Court how the issue of the polygraph came up?

A Well, initially I asked him how he would do if he took one.

Q And how did he respond-- or let me ask you this, why did you go on with that subject of the polygraph?

A I just did, I don't recall specifically.

Q Well, was it in relation to any type of subject like

credibility or you saw signs?

A Well, all during the interview, I was seeing signs from him based on the training and experience I had with the police department.

Q And--

A He wouldn't look us straight in the eye, he kept fidgiting around, holding his arms up over his chest, trying to hold things in and that says two things, A, he is trying to hold something in but at the same time I still really felt he wanted to talk to us and I found that was really verified at the conclusion of the interview because he felt much better after he told us he took the computer, much better.

Q He felt much better after he told you he took the computer?

A Much calmer.

Q And I am not sure if I understood, you said that he acted nervous but yet it seemed to convey that he wanted to keep talking to you?

A Yes.

Q What do you mean by that, can you articulate why you felt that way?

A Well, he was sort-- he would sort of ask around things. He was concerned about what might happen if this, in fact, happened. He just-- he would make statements and would almost leave it hanging in the air, like he wanted to say

something else but was kind of afraid to do so.

Q Now, do you have the tape with you and do you have the means of playing a portion of the tape?

A The tape is on the desk and the recorder is right here.

Q Do you know where you put it on the desk?

A To the [illegible], in the folder.

Q Well, I don't want to be part of the chain of custody and perhaps we don't need to play it since it's been admitted into evidence. My question is this. I see throughout this transcript, you've already made [illegible] to the effect of, "We understand that people [illegible] mistakes" and Mr. Lucas asked you if at times during the conversation, wasn't the conversation confrontational in nature?

A No, it wasn't.

Q It isn't?

A No.

Q How would you describe the tone of the whole interview?

A It was a quiet discussion. I was trying to provide him the opportunity to tell me what he really wanted to tell me anyhow.

Q And why did you keep saying, "I know that people have made mistakes?"

A That is one of the things I am trained to do when I

am taking an interview which is in some way to minimize the error.

Q Is that designed to give them the feeling of sympathy from you?

A Yes, I believe so.

Q To make them more relaxed so they can make a confession?

A Yes.

MR. LOUTH: No further questions.

THE COURT: Recross, no?

BY MR. LUCAS: RECROSS-EXAMINATION,

Q Well, I do, yes, Judge. Wait a minute, though, I mean Mr. Gafranke and you-- I mean you guys seem to be getting along so well but he's be always saying things like, "I can tell what you are going to say, you think I am a liar, you already made up your mind." Weren't there parts of the conversation like that?

A He did make those remarks, yes.

MR. LUCAS: I don't have any further questions.

THE COURT: You can step down. Do you have other witnesses on this issue?

MR. LOUTH: None, Your Honor.

THE COURT: Any evidence?

MR. LUCAS: No, Your Honor.

THE COURT: Argument?

MR. LOUTH: Judge--

MR. LUCAS: Could I have a moment?

THE COURT: Yes.

MR. LUCAS: I call Mr. LaFrankie.

THE COURT: It will be a few minutes?

MR. LUCAS: It won't be long.

Having been called as a witness and after being duly sworn, the witness testified as follows:

THE COURT: Please be seated, state your name and spell your last name.

A [illegible]

BY MR. LUCAS: DIRECT EXAMINATION,

Q Mr. LaFrankie, how did you feel in regards to whether you felt you would leave that interview with the detectives?

A I didn't feel I could.

Q And why is that?

A I don't know, I guess when you have two police officers around you, you just feel intimidated.

Q How long did the interview go on; do you recall?

A Thirty to 40 minutes.

Q And did you-- how was the tone-- how did you feel about the tone of the interview with the two officers coming and asking you questions?

A Very accusing and very like they already made

up their minds that I did it.

Q Did they ever seem to respond to your answers that made you feel like they believed anything you were saying?

A No.

Q So, you thought this was like 30 to 40 minutes of just constantly them telling you they thought you were lying?

A Yeah.

MR. LUCAS: No further questions.

THE COURT: Cross-examination?

BY MR. LOVIN: CROSS-EXAMINATION,

Q Mr. Lavender, that is your job there at the plant?

A I took the parts and processed them to be put on the circuit boards.

Q What type of computer was stolen?

A That I recall a computer.

Q Okay and you took that home and set the computer up at your house?

A There was a computer that was set up at my house, yes.

Q Okay, well, you made a confession you took the computer from work?

A I did.

MR. LUCAS: I object as being outside the

scope of direct.

THE COURT: Sustained.

Q The computer-- the computer that Detective Scott took from your home is a highly technical computer; isn't it?

MR. LAING: Judge, I am going to object.

THE COURT: Sustained.

MR. LAING: If I could respond on the record. What I am trying to establish is that this is someone who is capable of very subtle logical thinking. He is very knowledgeable when it comes to technical things and that we are not dealing with someone here who is of an educational background of elementary school. We are dealing with someone here who is very capable.

THE COURT: You can ask questions that go to that issue but I have told you not the questions you are asking go to that question.

Q You work with computers for a living; don't you?

A I work on components of computers for a living.

Q And you know how to run computers?

A I have a very basic knowledge of running a computer, yes.

Q And you know how to upgrade computers?

A No, I do not know how to upgrade computers.

Q You know how to upgrade software for computers?

A No, I don't.

Q You have had quite a bit of experience with law enforcement; haven't you?

A Not really, no.

Q Okay, you have been on a deferred sentence for a felony charge?

A Correct.

Q When you pled guilty to that felony charge, it was in court?

A Yes.

Q And were you given a very lengthy advisement of rights in court as to what your constitutional rights are in a criminal case?

A I imagine so.

Q And you also-- were you found guilty of perjury or did you plead guilty to perjury in Adams County?

A The perjury charge was a plea bargain with the district attorney on the same check fraud case.

Q Okay, when you pled guilty to the perjury in Adams County, did you receive a very lengthy advisement of rights as to what your rights are in a criminal case?

A I would imagine they would give me that, yes.

Q And would you be surprised-- well, in regard to the interview that took place between you and Detective Scott and Detective Goecke, the tone of that conversation

was very-- was very light and quiet; wasn't it?

A Not really, no.

Q Would you be surprised to hear that the typist who made the transcript had trouble hearing all the words because it was so quiet in the room?

MR. LUCAS: I will object on relevance. I think also--

THE COURT: Sustained.

Q In regard to the conversation that you had with the policemen in the room after they asked you if you had a couple of minutes to talk to them about this crime, your main concern was that you might lose your job over this; wasn't it?

A That was a concern, yeah.

Q And that is why you sat down and talked with them; wasn't it?

A No, I sat down and talked with them because management was wanting me to and I didn't feel that I could just say, "no" and leave.

Q And at some point you even said to them, "yeah, I want to clar this thing up myself?"

A I believe I made that statement.

MR. LOUTH: No further questions, Your Honor.

THE COURT: Redirect?

BY MR. LUCAS: REDIRECT EXAMINATION,

Q That statement was right at the beginning of the conversation with them; is that correct?

A I believe so, yes.

MR. LUCAS: No further questions.

THE COURT: You can step down. Any other evidence?

MR. LUCAS: No, Your Honor.

THE COURT: Argument?

MR. LOWEN: Your Honor, although I didn't read--I couldn't find the motion to suppress in the file, I take it the issue is one of custody and Miranda Warnings and secondly, whether-or-not the confession that was obtained from the detention was voluntary. First of all, in regard to the issue of custody, as the Court knows fully well, the Court has to use a reasonable person standard of review in determining whether-or-not a reasonable person would have felt that their liberty was restricted to such a degree equated with the formal arrest and in applying that test, the Court can look at the educational background of the defendant. You can look at the defendant's experience with the system. The Court can also look at the place of the interview, the length of the interview, whether-or-not any physical force was used and those are all issues that are looked into in determining whether-or-not one is in custody. I would argue that the defendant was not in

custody in this situation because of the fact that the interview took place at work. It was only a half hour in length. The interview took place at a location where the defendant was very familiar. The mood of the defendant would be one of-- well, it would be completely different at work as opposed to going down to the police station. This interview took place at his place of work, obviously. In regard to the [illegible] talk with them, he stated on the stand that he talked with them. One of the main reasons that it [illegible] was that he was scared of losing his job. I would argue that that is not a factor in determining whether one is in custody and I would cite as authority for that proposition People vs. Tomanio wherein a police officer who was a subject of a sexual assault investigation was hooked up to a polygraph and after the polygraph was done, the person conducting the polygraph said, "I believe you are deceptive with me, would you like to talk with me" and the police officer stated that the-- the investigator also said that, "if you refuse to talk to me, I will tell your supervisor about it." The police office testified at the motion's hearing that he felt that if he didn't cooperate and talk with the person running the polygraph that he would lose his job. The Supreme Court, reviewing that case, said that fear of losing one's job is not a factor for custody. The

focus is on the police, it is not on the job. If the defendant (sic) also imposed a fear on him that if he would not talk with the police, he would lose his job, that is unrelated to having fear placed on one from police that if you don't talk to us, you are going to jail or you have no choice but to talk to us. I would ask the Court to review the transcript and also from that transcript that Detective Scott is telling the truth when he says that at the outset of the interview, he simply said to the defendant, "We are here to investigate the theft of the computer, do you have a few minutes to talk with us?" and the defendant said, "yes, I would like to clear this matter up." If you look through the transcript, you can see, even if you don't listen to the tape, that the general tone that was used during the interview was one of somewhat of a, yes, it is a soft technique used to make one comfortable and relaxed so that confession is more likely. The Supreme Court in People vs. Jennings had the same situation or similar situation in that the person running the polygraph said that-- the defendant, who was a policeman, after the polygraph is over, she said, "I think you are being deceptive and I think you will feel a lot better if you tell me the truth" and the person who was running the polygraph was alone with that policeman for four hours. At the end of the four hours, the policeman eventually broke down and said that, yes, he had been-- the

defendant broke down and said, yes, he had been lying and he committed the crime pending against him. The Supreme Court at one point, interestingly enough, stated that, "although the polygraph examiner's manner and style of engaging the defendant in a post-interview situation were psychologically coercive, we cannot say with any assurance the polygraph examiner's conduct played any significant a role in overriding the defendant's will so as to have caused the defendant's confession to be involuntary or [illegible]." I would submit to the Court that's the case here. We don't have a situation where the police officer is lying about what evidence exists, the officer isn't saying, "look, so and so told us that you did it," we have a situation where the officer never alluded to the statement that, "listen, we all made mistakes, but if you just let's get better if you just lay this out," and I don't think that type of scenario plays such a significant role as to override somebody's free will under the circumstances here.

Any further argument, Mr. [illegible]?

MR. SMITH: No.

THE COURT: Mr. Lucas?

MR. LUCAS: I guess one of the big problems here is we have been talking about that there was an advisement of Miranda Rights in the Jennings case so that is very different than the case we got here. Judge, we got

a situation where you just don't get to do this, you don't get to take somebody off their working floor, take them into the victim's office where you know your job is on the line. This is the victim of the crime here. It's very much different than Jennings and talks to him for half an hour with continued prodding and telling him that he looks like he is sweating like a stuffed pig and got lint all over his face and he is lying, lying, lying and then just get to come back and say, "Well, I guess it just wasn't custody" and the Court, all it can do, is take a look at some of the things that was said here and you can see it creates an incredibly custodial type of circumstance. They talk about what a Judge would do, what I would do if I were the Judge. They are talking about how Boulder County will go light on him if you all do these kinds of subtle ways.

THE COURT: How does the conversation create custody? How does the tone of the conversation create custody? Doesn't the tone of the conversation go to voluntariness?

MR. LUCAS: Yes and I am probably confusing those two issues at this point in time but what you got with the circumstances is similar to a case we had this summer in this Court where the initial situation may be somewhat voluntary but the actions of the police

and the time factor here of half an hour or so of conversation creates more of a circumstance of custody. He is never told he is free to leave. He is never told he is not in custody. He is never given any Miranda Advisements whatsoever and they get him-- they removed him from a location on the floor and he is told by his boss-- his boss wants him to go to the police. The boss is the victim, acting on the part of the police as well and saying, " we're going to take a break" -- get him off the floor, gets him to a place where they can talk to him and once he is there, there is this authoritative accusatorial tone and he is never told he is free to leave. He is not sitting in a familiar environment as in the case of the boss's office. It's similar, there, I think to the situation where sometimes the circumstances can create a custodial situation. In other words, a person may not voluntarily go down to the police station but their words & actions by the police and certain things that is said by the police create a custodial situation. I will cite to the Court five cases. That would include People vs. Bern, this is a 1990 Colorado Supreme Court case found at 790 P. 2d 816. The Supreme Court found, The defendant was in custody at the time he gave statements to the police, so that Miranda applied, and was supported by evidence that defendant came to the police station at request of police, that he was

accused of sexual assaults, that he denied them, that he was was accused of lying, thta he was urged to take a polygraph examination, that he was encouraged to confess for the therapeutic effect it would have on the victim, and that, although he was told that he was free to leave and would not be arrested that day, he was informed the charges would be filed against him regardless of what he said during the interview," and that is exactly the type of situation we have got here because we are getting all of these subtle promises during the conversation, things about him not being arrested and yet the charges will be filed anyway. We got them talking about, you know, "if I were you, we got all this evidence, all this evidence about we'll find out anyhow, we'll get to the truth anyhow," telling him that. This situation is very similar to the facts in Horn. The therapeutic effect it would have on the victim is not the case here but therapeutic effect it would have on Mr. LaFrankie and also talking about his, you know-- playing on his religion, bringing that into the interview as well. Although he was told he was free to leave, that is what the evidence in Horn is, he is never told he is free to leave. Here, they say, "do you want to take a polygraph examination?" He is told point blank by the police officers there will be a polygraph examination.

When the polygraph comes out, this is what is going to happen, what the result is going to be when the polygraph examination comes out is it's going to show you are lying. This is very similar fact situation as People vs Horn.

THE COURT: Let me see it.

MR. [illegible]: I will give the Court all the cases I am citing. Another case would be Jones vs. People, this is a Supreme Court case of Colorado in 1986 found at [illegible]. "The defendant's statements to police were a product of custodial interrogation so as to require Miranda warnings where, by reason of suggestion made by police that defendant was lying after two hours and ten minutes of questioning at station house, any reasonable person in defendant's position would have considered himself [illegible] deprived of his liberty." The situation where they are continually berating him and telling him he is lying, that no person would think they were free to leave. People vs. Trujillo found at 784 P. 2d 738, a Colorado Supreme Court case from 1990, says, "Officer's station house interview of defendant was custodial interrogation requiring advisement and waiver of Miranda Rights; though officer was polite and placed no physical restrictions on defendant, the questioning, conducted in station house interview room with only

officer and defendant present, lasted approximately one and a half hours, purpose of interrogation was to gather evidence against defendant and refer matter to district attorney, questions put to defendant were accusatory in nature, and defendant was not certain that he was free to leave." So, I think it's stronger than the case here-- than in the cas[illegible]. As well, there is 782 P. 2d. 791, People vs. Cleburn and that is a Supreme Court case from 1989. "The evidence supported the trial Court's finding that interrogation which took place in defendant's home was custodial, requiring Miranda Warnings, including fact that the deputy initiated conversation, and that purpose was to obtain evidence against defendant; moreover, the interrogation lasted 20 to 30 minutes and finally, on a related matter I would cite to the Court, People vs Harris case, 703 P. 2d 667, a Colorado Court of Appeals case, 1985, "Failure to administer Miranda Warnings creates a presumption of compulsion and, consequently, unwarned statements that are otherwise voluntary within meaning of Fifth Amendment must nevertheless be excluded from evidence." That is-- in some cases, Judge, we are talking about crossing over the line, whether we are talking about custody or involuntariness but the actions of the police officers in this case rises to

the level of the type of outrageous behavior that could have been easily cured by the giving of a warning. It could be easily cured by telling him he had a right not to speak to them, tell him he didn't have to answer those questions and instead, not one but two police officers double-teaming him, continually telling him he is lying. We got a transcript for the Court. The Court can listen to the tape if the Court wants to do that but I think we brought out most of the salient facts that were at play here. I don't think that making these continued references to what a Judge would do and, "This is Boulder County and we would like to give this guy a break if you talk to me and stuff like-- so, you not wanting to worry about because you are not on probation anymore, this isn't the crime of the century," and he kept trying to tell him this isn't the crime of the century, it isn't going to be that bad, it's not that serious, that kind of stuff is very coercive. Some of the other things that were brought out, I believe, are the stuff about the polygraph which I had gone over before, coercing him that there is going to be-- on page eight, "When we put you on a polygraph, you are going to fail." That kind of stuff. It's just not right. It's highly coercive. Telling him about the guy who lies is in jail and still in jail before even coming to Court, that is what the officers told him. I mean that is pretty obvious when you got the

guy saying-- the one detective saying, "unless you tell me you murdered Mother Theresa, you are not going to jail," basically promising that if he cooperates, he is not going to jail and the other person, the other detective telling him about the person who lied to them, now that person is in jail even before going to Court. It's kind of subtle things that are at play all over-- some of them not very subtle things all over this interview.

THE COURT: Anything else, Mr. South?

MR. SOUTH: I would note for the Court that People vs. Jones is a station house interview. People vs. Trujillo is a station house interview. People vs.--

THE COURT: People vs. Cleburn is not, Cleburn is in the home.

MR. SOUTH: You are not--

THE COURT: Mr. Cleburn took place in the home.

MR. SOUTH: Yes, it was a sparsely populated area where the police drove out, went to his house and, in fact, had fairly good evidence he was a suspect in committing a menacing. In People vs. Horn, which the defense relies on very heavily, The Court notes that the interview took place in a room that was eight foot by 12 foot. There were no windows. Again, that was at a police station, obviously. The officers left him alone by himself in that room, the eight foot by 12 foot for a period of time so that

he could think it over. I would argue that all of those cases can be differentiated from the case at hand, primarily because the officers in this case, you can tell from the transcript, did not know if he had actually stolen the computer. At first, it was from the angle of he just was in possession of stolen property and that a theft by receiving complaint was possible, they were on a fact finding mission and I would argue that the defendant was not in custody in light of the facts that-- in light-- well, the things have already been gone over, I won't take up the Court's time to reiterate them anymore.

(The ruling on this issue has previously been transcribed and is hereby deleted, as requested.)

THE COURT: There was a search which was pursuant to it, neither of you addressed that in your argument pursuant to the interview. There was a search made in which a consent was signed. We didn't discuss that in any specific detail. So, you need to explain to me how you feel you are going to approach the consent? If there was a sufficient basis for the signing of the consent to search, the search would be valid. If it was not, it would not be. Is it? It depends upon what you are going to argue and show.

MR. LUCAS: Well, Judge, we'll argue about based upon what we heard is that Mr. LaFrankie was not willing to consent to a search and that later on in this

same-- in this same defective interview--

THE COURT: Well, the very first page, like two seconds into it he says they can go look if they want to.

MR. LUCAS: I think again the Court will be in a position where there will be the same ruling about Miranda, the same kind of decision, questioning this person whether-- in determining whether this is knowing or voluntary.

THE COURT: I don't have the consent form and nobody talked about it. I don't know if someone anticipated we would do that another time or what. There is a written consent I heard about but I didn't hear any evidence about it. Are the people putting any evidence on about it? I don't know if you are or not but do you have a different impression how you were going to proceed?

MR. LOUTH: I would like an opportunity to go ahead and put on evidence with regard to that issue and although we don't have the form, Detective Scott can still testify as to what occurred.

THE COURT: Mr. Lucas?

MR. LUCAS: I think the Court's situation is that what the Court heard is that Mr. LaFrankie wasn't given an adequate advisement of his rights regarding anything and the question is he is never given even the option of, you know--

THE COURT: I don't know what the consent is. That

I am saying is if there is more evidence about that-- I don't know, if it wasn't put on because you were all going to anticipate doing it after the Court's ruling here, that is fine. I don't know what you anticipated.

MR. LUCAS: I had not anticipated that.

THE COURT: Do you have evidence about the circumstances under which the consent to search was signed and what advisements were given, all the rest?

MR. LOUTH: Other than the transcript?

THE COURT: Yeah. If the transcript is it, I am prepared to rule on that--

MR. LOUTH: Judge, I would like to call Detective Scott to the stand.

THE COURT: Detective Scott, you are still under oath.

DETECTIVE SCOTT: Yes.

BY MR. LOUTH: DIRECT EXAMINATION,

Q Detective Scott, we have all reviewed the transcript and the transcript of the interview that you had with the defendant in this case. Now, early on in the interview, the defendant indicated that you could look at his house if you wanted to. Did you actually go over to his house at some point then?

A Yes.

Q Okay and approximately what time of day did

the interview take place?

A It took place about 3:00, 3:00 to 4:00.

Q Okay and what time of day did you go over to the defendant's house?

A Right after we did the interview.

Q Okay and at that time was there any further discussion about going into his house?

A When we were in the house, I believe he signed a consent to search form printed by the Longmont Police Department which discusses the fact that he has the right to consult an attorney before agreeing to a search and the right to refuse to have such a search made without a search warrant and none-the-less he agreed to allow us to have the search of the residence.

Q Okay did he actually sign that form?

A I believe so.

Q Did he indicate he had any trouble reading the form at all?

A No.

Q What was his mood like at that point?

A He felt better.

Q From the confession?

A I think so.

Q Now, you didn't go over to his house with him; correct?

A .No, he drove his car and we drove ours.

Q Where did he meet you, at the front door, in the house?

A I think he got there shortly before us and he was at the front door or we followed him up to the front door.

Q Okay, so he let you into his house?

A Yes.

Q Prior to his signing the consent form, had you asked to see the computer?

A Well, we could see it in the kitchen. It was there, the kitchen was visible from the living room.

Q It was visible in the kitchen but did you know that was actually the computer?

A I am not sure in which order they came in.

Q Well, I guess it doesn't make much sense to do a consent to search if the computer is right there?

A I believe we had him sign the consent to search first but I am not sure.

Q Did he have any questions?

A The only issue that he raised was that he had upgraded the computer and he was concerned about the money he had spent upgrading the computer. He put something into it, I don't know that much about computers myself and he was concerned about what he had put in there. He was concerned

about a part because he took it out and put in another one.

THE COURT: Cross-examination?

BY MR. LUCAS: CROSS-EXAMINATION.

Q Detective, Mr. LaFrankie recalls that you went inside the home and were in the home looking around and then you came out and handed him the consent to search. Do you recall that?

A I'm sure we were in the house before he signed it, yes.

Q Before he signed it, okay and you saw the computer right by the door when you came in?

A It was in the kitchen but you could see it from the living room.

Q Okay and do you recall exactly where it was that the signing of the consent form or going into the consent form was?

A The living room, right off the kitchen.

Q Okay and you are not sure exactly when that occurred?

A Not exactly.

Q Okay, did you read through the form with him?

A Yes.

Q Did you read it out loud to him?

A I usually do, I don't specifically recall now but

I usually do.

Q May you have not in this case?

A I doubt it.

MR. LUCAS: No further questions.

THE COURT: Anything else?

MR. LOUTY: No, nothing, Your Honor.

THE COURT: You can step down. Other evidence?

MR. LUCAS: We will call Mr. LaFrankie.

THE COURT: You are still under oath.

MR. LAFRANKIE: Yes.

BY MR. LUCAS: DIRECT EXAMINATION.

Q What is your recollection of what occurred at your residence?

A They came to the door and we went in. The computer was in the living room on the dining room table and he got some paperwork out and said, "I need you to sign this consent to search" and I signed it on my desk which was also there in the dining room but I believe undoubtedly I would-- I read through it and signed it and gave it to him and then they started taking serial numbers

THE COURT: I don't understand what you said, undoubtedly you would or you did or what?

A I don't remember that I definitely read through it but I know I signed it but the officer never read it over with me. It was just handed to me and I do have a habit

of sometimes of not always reading things, just taking somebodys word for what it says and signing it.

THE COURT: And this was after the officers came in and discovered the computer there?

A Yes.

THE COURT: How did they get into the house, did you open the door and let them in?

A I don't recall exactly, they either followed me in or were very close behind me.

THE COURT: They didn't go in without you, did they?

A They didn't go in without me.

Q And you had the keys, right?

A The door was unlocked, my wife was at home.

MR. DUCAS: No further questions.

THE COURT: Cross-examination?

BY MR. LOUTH: CROSS-EXAMINATION,

Q They didn't go into the house against your will?

A Probably not but I didn't feel I could tell them, "you can't come in."

Q And you did invite them over to the house to look at it?

A I invited them over to the house to search the house.

MR. LOUTH: No further questions.

THE COURT: Anything else?

BY MR. LUCAS: REDIRECT EXAMINATION,

Q Why did you do that, why did you ask them over to the house?

A Because they told me they could get a search warrant so it seemed like it didn't matter one way or the other.

BY MR. LOWE: RECROSS-EXAMINATION,

Q Then did they tell you that?

A [illegible] believe, in the interrogation in my [illegible] office.

Q You believe they did that?

A I know I was told they could get a search warrant, it just [illegible] it was at the house or if it was in the [illegible] where I was employed.

Q Okay, so it was either at the house or in the interview room?

A Correct.

MR. LOWE: No further questions.

THE COURT: Okay, you can step down. Argument?

MR. LOWE: Judge, I would argue he did give them voluntary consent in that he said at the very outset of the interview that the police could come over and look at this computer. His comment just now that the police said, "if you don't let us come over, we could just get a search warrant," I would just ask the Court to find that to be not credible in light of the fact that at the outset

of the interview he indicated they could come over and look at the ocmputer. Also, Detective Scott indicated that the defendant, after confessing, felt much better, to basically have it off of his-- not to use the words but to basically have this matter off his chest. The consent was made at the outset of the interview. As far as whether the consent form that he signed took place after Detective Scott had seen the interview-- or had seen the computer or took place before or afterwards, I would argue doesn't really matter in light of the fact that they were already invited into the house and even if Detective Scott already saw the computer before the consent to search was signed, the computer was in plain view at that point. This is not a case of fruit of the poisonous tree because of the fact that the Court found that the defendant was subjected to custodial interrogation after taking into consideration the nature of the interview as seen throughout the transcript. This consent of, "you can come over to my house" took place at the very start of the interview which I would argue took place before the defendant was being subjected to custodial interrogation. His invitation over to his house then allowed the police to go over there. They are going into the house, seeing the computer and then would just be a matter of finding incriminating evidence in plain view, plus that before the police took anything, they

had a consent to serach which the defendant acknowledged he read and signed.

THE COURT: Mr. Lucas?

MR. LUCAS: The reason it is the fruit of the poisonous tree is because this is what the conversation was about. The Court already made a ruling about voluntariness, said that is not an issue here, they have got him down and they are doing this interrogation and they are, right off the bat, telling him that, "We are lying and we know you are lying and that is what we are prepared to do-- trained to do and we know" and they are all mix right off the bat. I mean that is the first thing going on.

THE COURT: None of that conversation is about going to go to get the computer. All the things I talked about? All during the course of that conversation, there is none of that said that "We'll go get the computer and you can't stop us." There is none of that? There is nothing in the transcript about that at all, that is why it's a separate issue, it seems to me. I don't see anything in there about anybody talking about getting the evidence or we can get the evidence. So, it's not a product of this interrogation?

MR. LUCAS: I know that there is a reference to a warrant in the transcript that the Court has in evidence and I don't know-- I am not having an easy

time finding it but I think Officer Goecke or Gokke's statement and argument to the Court that this is where it comes off from, they placed him in the position immediately where they believe that he has-- that he has to talk right off the bat. They don't tell him, "you can leave or you don't have to talk to us." It's the ruling the Court just made and all of that comes right off the bat.

THE COURT: There is a discussion about a warrant which is the warrant for arrest. However, there is a statement about do they have a warrant for his arrest.

MR. GOCKE: Or your arrest.

THE COURT: Yes, that is the one I recall.

MR. GOCKE: Right but the situation that the Court can see in the beginning here is the initial stuff about pinning him down and making him have to talk. The only reason they get to search in because they are asking him all of these questions and they ask him the questions about whether they can go over to his house to get the computer or not. So, it's not-- I mean if the Court is only focusing on that aspect of it, it's the fruit of a statement. The statement, he answers two questions about going over to his house. It's part of the same interrogation that they start out-- isolating him and grilling him with the questions and saying, "this is what we want to do and you

are lying to us and nobody would get nervous unless they had done something wrong and that is exactly what you are doing" and they they ask him the question if they can go over to his house and look through his house. That statement, that is the problem. In other words, it's the same ruling the Court just made, separating the issue of voluntariness from issues regarding Miranda. It's a statement because he is being coerced into talking to the police officers, not coerced, so to speak, but he is not being told he doesn't have to talk or he doesn't have to cooperate and so they continue to ask him these questions and the fruit is directly these statements, asking him questions about whether they can go over to his house during that same interview. So, there is no real break in the chain here. There would be a break if we were at that questioning maybe happened before the interview but it happens as a product of the interview and during the interview.

MR. COUNT: Okay except there is time that goes by between that time and the other time. There is time that goes by between the end of the interview because people have to drive there separately. They are no longer in the proximity of the officers. He is then given a written form that talks about his rights in more detail. You don't think anything is anticipated by all those things that happened?

MR. LUCAS: No, because the conversation occurs and from the testimony the Court heard, there was not a great gap. They sit around and pat each other on the back. They get done with the interview and right away asking about going to his house occurs there and they separate, he is not with the police any longer. There is no more contact where they are given the opportunity to, say, remove the tape by saying, "here, let's talk to Mr. Lavrankie and tell him we don't have to go to the house." They drive separately and the whole time he has in mind that he has to let them in his house. Based on conversations, they go to his house, they go into the house and then when the officers are already in the house and they already found the computer setting right there, then they hand him a consent to search. "Oh, you, we forgot to do the consent to search. [illegible] whether it's voluntary or not. This is why I don't think there is any taint removed.

THE COURT: I will give you an opportunity to brief the issue of whether-or-not the taint is removed or not at that point so that I can rule appropriately. We got the evidence that we need. There is a motion to continue, do we have to deal with that motion?

MR. LUCAS: I think so, Judge, I will be in trial next week. I got two jury trials next week and this is the week after so what I am saying to the Court is I don't

think I can brief the issue and be ready to resolve anything in the next--

THE COURT: You are not objecting to their motion to continue?

MR. LUCAS: If I could have a minute?

THE COURT: Let's go off the record. (There was a short discussion between counsel) We are back on the record, Mr. Lucas?

MR. LUCAS: Yes--

THE COURT: What do you have to say about the motion to continue the trial?

MR. LUCAS: We don't object to the Court continuing the trial.

THE COURT: Whatever we set do you agree would be within thirty days ready trial dates are necessary?

MR. LUCAS: That is correct.

THE COURT: Is that correct, Mr. LaFrankie?

MR. LAFRANKIE: Yes.

THE COURT: Okay, the week of January 25.

MR. LOETH: Fine.

MR. LUCAS: That is fine.

THE COURT: Could we have briefs within 15 days on the issue about the search?

MR. LUCAS: Could I ask the Court for 20? The rest of this week I will be preparing for trials. All next

week I will be in trial, there are two trials.

THE COURT: That is why I gave you 15, all right, 20. Short briefs.

MR. LUCAS: Thank you, Judge.

MR. LOUTH: Thank you.